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No. 81-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
Petitioner,

v.

DARREL C. NOTTELSON
and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly interpreted this Court's holdings concerning religious accommodation under the Civil Rights Act of 1964.

II. Whether the religious accommodation provision of the Civil Rights Act of 1964 is a constitutionally permissible accommodation of the First Amendment right to free exercise of religion and thus does not violate the Establishment Clause.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This brief is in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by Smith Steel Workers D.A.L.U. 19806, AFL-CIO (hereinafter the "Union"). A. O. Smith Corporation was also a Defendant in the district court and an Appellant in the court of appeals. A. O. Smith Corporation (hereinafter the "Company") has filed a separate Petition (No. 81-97) seeking review of the decision below. Respondent, Darrel C. Nottelson, has filed a Brief in Opposition to the Company's Petition and since the legal issues involved in the Company's Petition and the Union's Peti-

tion are similar, much of what was said by Respondent in response to the Company's Petition is applicable to the Union's position.

OPINIONS BELOW

The District Court entered three memoranda and orders. The first, dated December 7, 1979, is reported at 481 F. Supp. 756 and is reprinted in the Company's Supplemental Appendix beginning at B-1. The second, dated April 18, 1980, is reported at 489 F.Supp. 94 and is reprinted in the Company's Supplemental Appendix beginning at B-25. The third, dated September 18, 1980, is unreported and is reprinted in the Company's Supplemental Appendix beginning at B-45. The District Court entered a judgment on April 18, 1980, which is reprinted in the Company's Supplemental Appendix beginning at B-19. The decision of the Court of Appeals is reported at 643 F.2d 445 and is reprinted in the Company's Appendix beginning at A-1. The court of appeals' order denying rehearing is reprinted in the Company's Supplemental Appendix beginning at E-1.

SUMMARY OF ARGUMENT

Petitioner claims, in effect, that an exception is carved out of Title VII of the Civil Rights Act of 1964 law for union security provisions. It is the Union's claim that Title VII conflicts with the provisions of the National Labor Relations Act (NLRA), and the NLRA must control on the basis of national policy. The Union also claims that Section 701(j) of Title VII violates the Establishment Clause of the First Amendment and must be struck down. All of the courts of appeals ruling on these issues (Fifth, Sixth, Seventh, and Ninth) have rejected both of these arguments and held that Title VII requires that unions attempt to accommodate those individuals who hold religious beliefs that proscribe union membership or financial support.

Respondent, Darrel C. Nottelson, claims that Title VII's objectives and the NLRA must be read together to arrive at congressional will. This Court has ruled that the individual's rights to equal employment opportunities, as guaranteed by Title VII, are to be given priority over majoritarian concepts embraced in the NLRA. Subsequent legislation gives support to this view.

Title VII's religious accommodation provisions do not violate the Establishment Clause. Since *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court consistently has recognized that "benevolent neutrality" required under the Establishment Clause permits legislatures and even sometimes requires courts to provide for the accommodation of religious beliefs.

Under this Court's Establishment Clause test, Section 701(j) of Title VII has a secular purpose, does not have a primary effect of advancing religion, and does not excessively entangle the state in religious affairs. Thus it does not violate the Establishment Clause.

STATEMENT OF THE CASE

Nottelson's Religious Convictions

Darrel C. Nottelson became a member of the Seventh-day Adventist Church in May, 1966. It is an historical teaching of the Seventh-day Adventist Church that its members should not join or financially support labor unions and similar organizations.

Although Nottelson's religious convictions on the labor union issue evolved over a period of time through his studying the *Bible* and the teachings of his Church, at the time he took his stand he believed that it would be a sin if he violated his conscience by continuing to belong to or financially support the labor union.

The Actions of the Parties Prior to Commencement of This Suit

By December, 1974, Nottelson reached the point where, because of his religious beliefs, he felt compelled to sever all ties with the Union. As a result he notified the president of the local Union of his decision and requested a meeting. On December 11, 1974, the Union president met with Nottelson and three representatives from his Church, including the director of religious liberty for the regional headquarters of the Church. At this meeting the religious liberty director suggested that Nottelson's beliefs could be accommodated if Nottelson were permitted to pay, in lieu of union dues, the equivalent amount to a non-union, non-religious charitable organization.

The Church representative explained that the AFL-CIO Executive Council had adopted a policy recognizing the religious convictions of individuals who could not belong to labor unions or financially support them and asked all affiliated unions and internationals to adopt this principle as their policy. The Union president was told that many unions had accommodated such religious belief by permitting an employee to make a charitable contribution in lieu of union dues.

On December 18, 1974, Nottelson, by letter to the Union president, resigned from the Union and again requested that the Union make "a reasonable accommodation" for his religious beliefs "in harmony with the recommendations of the AFL-CIO Executive Council." This was submitted to the local Union's executive board.

On January 21, 1975, Nottelson, accompanied by his minister, appeared before the executive board. Nottelson explained his religious beliefs and why he was opposed to being a member of or supporting a labor organization. Nottelson also again stated that he would be willing to pay an amount equal to union dues to a charitable organization. No one from the board offered any alternative suggestion.

On February 4, 1975, the board denied Nottelson's request for an accommodation. The board stated that "they could not . . . make an exception since it would be contrary not only to the Union's Constitution and Bylaws but to the labor agreement negotiated with the A. O. Smith Corporation." This was the board's only basis for rejecting Nottelson's proposal.

Although the Church's representative had discussed the requirements of Title VII with the Union president on December 11 and had furnished him and the board with copies of the law and the EEOC interpretation of the religious accommodation requirements of Title VII, the board never discussed the Title VII accommodation requirements during the February 4 board meeting.

In the absence of any agreement with the Union, Nottelson unilaterally commenced paying an amount equivalent to his union dues to the American Cancer Society in order to show his good faith. Nottelson again asked to be heard by the Union board, which scheduled a meeting for April 8, 1975.

Prior to the April 8 meeting, the secretary-treasurer of the Union contacted a regional director of the national AFL-CIO to inquire about the "Statement by the AFL-CIO Executive Council on Union Membership and Religious Objectors" dated September 20, 1965. The regional director advised that such a resolution had been adopted and suggested that the secretary contact the AFL-CIO headquarters in Washington. He also advised that such an accommodation could be made, notwithstanding the union security provisions of a collective bargaining agreement. The secretary-treasurer requested a copy of the statement by the AFL-CIO Executive Council, which was mailed to her by the AFL-CIO national headquarters on March 25, 1975, and which she received before the April 8 meeting.

On April 8, 1975, Nottelson again appeared before the executive board requesting that the board reconsider its

February 4 decision. At this meeting Nottelson again asked that he be permitted to pay his dues to a charitable organization.

The Union president was aware of the action by the AFL-CIO Executive Council, and he had no question that that was still the policy of the AFL-CIO Executive Council. For this reason he did not feel any further need to seek the advice of the national AFL-CIO.

The executive board at the April 8 meeting ignored the fact that the AFL-CIO regional director had stated that an accommodation along the lines of Nottelson's suggestion was not only permissible but in accordance with AFL-CIO national policy. The board again took the position that to grant Nottelson's request would be contrary to the Constitution and Bylaws of the union.

On April 15, 1975, the Union notified the company that Nottelson had been expelled from the Union for non-payment of dues. On April 17 the company issued to Nottelson a notice entitled "Expelled Union Members."

Nottelson appealed the decision of the Union board to the Union membership. His appearance was scheduled for the membership meeting of April 23, 1975. At the membership meeting the secretary-treasurer read the recommendation of the executive board of the local exactly as it appeared on the agenda.

Nottelson then made his presentation to the membership. The Union president, who chaired the meeting, made a statement to the effect that unless there was a motion to overturn the decision of the executive board, the matter would be considered closed. No one spoke, and the chairman went on to the next order of business.

The Union president also stated that he never discussed the requirements of Title VII with the membership of the union. There was no suggestion at this meeting of any other alternative accommodation for Nottelson. The day

after the membership meeting the Company informed Nottelson he was going to be fired for non-payment of union dues.

The Parties' Actions After Filing of This Suit

The Union told Nottelson on April 17, 1975, that he would be fired. On April 23 he filed action in the District Court seeking injunctive relief pending final disposition of the charges which had been lodged with EEOC.

On April 30 the District Court heard Nottelson's motion for a temporary restraining order and issued a temporary restraining order extending to May 23, 1975, at which time a full hearing was scheduled to hear proofs on the issuance of a temporary injunction.

On May 7, 1975, a member of the Union's executive board wrote to Nottelson acknowledging his letter of December 18, 1974, in which he had asked the Union to allow him to drop Union membership and to cease paying dues and fees to the Union. The letter stated that the Union was willing to free Nottelson from remaining a member of the Union, but insisted that he continue to financially support it.

On July 3, 1975, the Equal Employment Opportunity Commission (EEOC) issued its determination that there was reasonable cause to believe that both the Company and the Union had engaged in unlawful employment practices against Nottelson.

On July 10 Nottelson, the Company, and the Union, by their respective attorneys, appeared at EEOC for a scheduled conciliation conference. After the conference, at which all parties agreed that conciliation efforts had failed, a memorandum was signed by attorneys for each of the parties setting forth their respective positions. The Union stated it was not willing to make any accommodation other than as specified in its May 7 letter. The Company claimed only to be a stakeholder. Nottelson claimed that the Union

and Company had failed to make or offer any reasonable accommodation.

The district court, ruling on Nottelson's motion for preliminary injunction, held that it did not, at that time, have jurisdiction over the matter because a Notice of Right to Sue had not yet been issued by EEOC although its issuance was imminent.

On July 11, 1975, a representative of the Company called Nottelson at his home to tell him that he was terminated as of that date. Nottelson indicated that he had accumulated vacation time and asked if he could go on vacation instead of being dismissed.

A Company representative called the secretary-treasurer of the Union to see if the union would consider "such a deviation." The Union executive committee responded with "no deviation." The Company then informed Nottelson that it would not even extend the termination date for two more weeks even though the collective bargaining agreement was silent on the question.

Non-Discrimination Provision in Union Contract

Although the collective bargaining agreement, in effect, did contain a union security provision, it also contained a nondiscrimination provision which stated in pertinent part: "The company and the union agree that there shall be no discrimination because of . . . religion . . . ." One of the Union's witnesses and the chairman of its grievance committee testified that in interpreting other provisions of the collective bargaining agreement the particular provision of the contract relating to discrimination had to be taken into consideration.

The "Charity-Substitution" Accommodation

The associate director of the Department of Public Affairs and Religious Liberty of the General Conference of Seventh-day Adventists testified about the use of the

"charity-substitution" accommodation at both the May 23, 1975, hearing and the September 2, 1977, trial. He testified that the "charity-substitution" method of accommodation had its origin in a labor committee of Congress, had been embraced by many labor organizations as a workable accommodation, and had proved to be acceptable to most of those individuals who hold religious views against the payment of dues to a labor union. As a result the Seventh-day Adventist Church has counseled its members to request and accept this kind of accommodation.

On May 28, 1965, George Meany, the president of the AFL-CIO, submitted a letter to the Special Subcommittee on Labor of the House Committee on Education and Labor. He stated that he was "strongly of the view that unions and employers should undertake to accommodate religious objections with regard to union security arrangements." He stated that "I believe that unions, and employers, too, should accommodate themselves to genuine individual religious scruples, and I am sure that all of our unions will take that view too." He then announced: "I intend accordingly to propose to the AFL-CIO Executive Council that it adopt a strong policy statement to that effect." Less than four months later the Executive Council of the AFL-CIO did in fact adopt such a policy statement. A representative of the General Conference of Seventh-day Adventists testified that Meany, in his presence, assured the Congress that labor would take care of accommodating "these people."

The local Union president testified that a directly affiliated union, such as the defendant Union, answers directly to the AFL-CIO Executive Council. He further stated that the final determination of "matters of national policy" come from the AFL-CIO Executive Council and that it is the Executive Council that formulates national policy.

Undue Hardship?

The Union president admitted that the company paid his salary. The Company also pays the salaries of the Union's

grievance committee while it meets on company premises, where it spends the majority of its time. Likewise, the Union's negotiating committee is paid by the Company for up to eight hours a day if it is on Company premises.

The Union president was questioned during redirect examination by the Union's attorney as to whether Mr. Nottelson's not paying his monthly union dues would financially break the union. To which the president responded, "No." Further, his only stated concern was that if the union accommodated Nottelson, it would destroy the fair-share concept and have a steamrolling effect. On cross examination the president admitted that he had never heard of any union where there had been a "steamroller effect" and a big fallout of union membership or discontent as a result of a union making such an accommodation. He further admitted that he had not even attempted to find out what effect the charity-substitution accommodation had on those unions that had tried it. He also stated that he had absolutely no knowledge of any union that had been harmed by making such an accommodation.

At the conclusion of the trial, a Company representative, in responding to an inquiry of the court, stated that if the Union had granted the accommodation sought by Nottelson, it would have presented no problem to the Company.

Special Employment Impediments Faced by Nottelson and Those with Similar Religious Beliefs

While looking for another welding job after he was fired by the Company, Nottelson became acquainted with the major hiring factories in the Milwaukee area. The bigger factories were all covered by union-security provisions in their collective bargaining agreements and therefore any available jobs would have demanded union membership. The Union president, in his testimony, admitted that based upon his experience and contact with other union people, most of the larger manufacturing plants in the Milwaukee area are unionized and Milwaukee is a "union town."

REASONS FOR DENYING THE WRIT

"Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority . . . and it is commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part." Emporium Capwell Co. v. *Western Addition Community Organization,* 420 U.S. 50, 60 (1975).

THE JUDGMENT OF THE SEVENTH CIRCUIT IS CLEARLY CONSISTENT WITH THE HOLDINGS OF THIS COURT AS TO THE IMPACT OF TITLE VII ON NATIONAL LABOR POLICY AND THIS COURT'S TEACHINGS CONCERNING THE ESTABLISHMENT CLAUSE. THERE IS NO CONFLICT IN THE CIRCUITS ON THESE ISSUES.

The Union in effect urges this Court to upset the decisions of the Fifth, Sixth, Seventh, and Ninth Circuits[1] and hold that Title VII of the Civil Rights Act of 1964, as amended, provides no protection for those who religious beliefs proscribe union membership or financial support. In order to accomplish this, the Court would have to read into Title VII law a special exemption for labor unions which does not appear anywhere within the text of Title VII. The Union also asks this Court to invalidate § 701(j) of Title VII. This would require the Court to not only reject the holdings of four Circuit Courts of Appeals but its own teachings on the issue of religious accommodation as embodied in *Sherbert* v. *Verner, supra.*

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[1] *See Cooper* v. *General Dynamics,* 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom. IAM* v. *Hopkins,* 433 U.S. 908 (1977); *McDaniel* v. *Essex International, Inc.,* 571 F.2d 338 (6th Cir. 1978); *Anderson* v. *General Dynamics Corp.,* 589 F.2d 397 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979); *Burns* v. *Southern Pacific Transportation Co.,* 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979) and *Yott* v. *North American Rockwell Corp.,* 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 100 S.Ct. 1316 (1980).

The Union contends that all of the appeals courts which have examined the issues involved here have come up with the wrong conclusion and therefore this Court must assume the judicial responsibility to reconcile separate congressional enactments (Title VII and the NLRA). Petition at 9. The Union says this Court should grant a Writ of Certiorari "to remove Title VII and the EEOC from an area into which they have erroneously been thrust by the lower courts." Petition at 9.

What is clear is that it was not just the lower courts but the Congress also that believed that Title VII was applicable to "all aspects of religious observance and practice, as well as belief," 42 U.S.C. § 2000e-(j), and that no special exemption had been carved out of Title VII law, *sub silento,* for union security arrangements.

I. This Court Has Recognized That The Broad National Labor Policy Gives Priority To The Mandate Of Title VII.

As our society has become more complex, industrialized and impersonal, it has become correspondingly more difficult for individuals to find employment where their religious needs are voluntarily accommodated. Many have faced the economic hardships of unemployment as a result of their religious connections.

Congress, in adopting Title VII of the Civil Rights Act of 1964, attempted to root out discrimination in the private sector of employment. As the Chief Justice stated in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the purpose of Title VII was to achieve equality of employment opportunities.

This Court in *Griggs,* in arriving at the proper legal defiintion of the term "discrimination" under Title VII law, rejected the concept of "ill will." It also held that the terms meant more than "unequal treatment." Although unequal treatment is an illegal discriminatory practice, the *Griggs* Court held that Title VII is also directed against

the "consequences" or "effects" of an employment system. According to *Griggs*, if an employment practice operates to exclude a minority, it is illegally discriminatory. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

The Court in *Griggs* also held that good intent or absence of discriminatory intent does not redeem a system which operates as "built-in-headwinds" for minority groups.

At the same time that Congress made it unlawful for an employer to fail or refuse to hire, to discharge or otherwise to discriminate against an individual because of race, color, sex or national origin, it also proscribed similar employer conduct on the basis of religion. 42 U.S.C. § 2000e-2(a).

In addition, Congress specifically stated that it is an unlawful employment practice for a labor union to discriminate against an individual because of his/her religion or to cause or attempt to cause an employer to discriminate against an individual in violation of the Civil Rights Act. 42 U.S.C. § 2000e-2(c)(1) and (c)(2). One exception is set forth in the statute, that being unintentional discrimination resulting from the implementation of a bona fide seniority or merit system. See 29 U.S.C. § 2000e-2(h).

Congress therefore sought to eradicate religious discrimination by employers and unions at the same time as it sought to eliminate discrimination as to race, color, sex, and national origin.

In 1967 the federal Equal Employment Opportunity Commission adopted "Guidelines on Discrimination Because of Religion." These Guidelines decreed that the duty not to discriminate on religious grounds included an additional obligation on the part of the employer to accommodate the religious practices of employees or prospective

employees so long as they did not impose an undue hardship on him. 29 C.F.R. 1605.1 (1967).

In 1972, after certain court decisions had cast some doubt on the EEOC religious discrimination Guidelines and the whole area of religious discrimination, Congress, in an attempt to clarify its position on religious discrimination in the private sector, amended Title VII, clearly stating that an accommodation must be made for an individual's religious observance, practice, and belief, if that could be done reasonably without undue hardship to the employer. 42 U.S.C. § 2000e(j) [§ 701(j) of Title VII].

The 1972 amendment to Title VII provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Although there was considerable disagreement in the Congress as to the enactment of the Civil Rights Act of 1964 and the subsequent amendments thereto, the adoption of the 1972 amendment was effected without dissent in the Senate.

It should be recognized that the area of religious discrimination has a somewhat unique position in the legislatively protected areas of Title VII. Discrimination on the basis of race, color, sex, or national origin usually affects a substantially large and identifiable class. Religious discrimination, on the other hand, generally involves only a one-to-one situation. The accommodation standard written into law requires the courts to weigh the impact of specific employment practices on a specific individual's religious practices and then fashion an individual remedy.

The Union in its Petition argues that Congress' determination concerning the legality of various forms of union security are a central component of the National Labor

Policy and cites for support of this statement a 1947 Senate report. Petition at 10-11.

The Union ignores the fact that congressional labor law and social-policy concerns have changed drastically since 1947. The problems of the 1930's and 1940's are not the congressional problems of the 70's and 80's. The congressional concern for the nascent labor movement in the 30's and 40's changed over a period of years from near absolute protection of the majoritarian interest of organized labor to the preservation of equal employment opportunity for the individual free from discrimination by design or consequence.

In *Emporium Capwell Company* v. *Western Addition Community Organization, supra* at 60, this Court declared that the National Labor Relations Act must be construed "in light of the broad national policy of which it is a part." This Court held that national labor policy embodies the principle of non-discrimination as a matter of highest priority. Therefore, in construing the NLRA, courts must not ignore other legislative enactments, including Title VII, and public policy.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court unanimously ruled that Title VII employee rights could not be foreclosed by binding arbitration. Mr. Justice Powell stated that by its very nature Title VII "stands on plainly different ground; it concerns not majoritarian process, but an individual's right to equal employment opportunities." According to the Court, "Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices." *Id.* at 51.

Title VII's public policy objective of equal employment opportunities regardless of race, sex, or religion and the National Labor Relations Act and its objective of labor peace must be read together to arrive at the proper con-

gressional will. "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc.* v. *Retail Clerk's, Local 770,* 398 U.S. 235, 250 (1970).

The above principles are the basis of and sustain the holdings of the Fifth, Sixth, Seventh, and Ninth Circuits, which have found that § 701(j) of Title VII is applicable to union security provisions when such provisions clash with religious beliefs and impede the policy of equal employment opportunity for all.

Simply stated, § 701(c) and § 701(j) of Title VII require the union to observe, as *Alexander* v. *Gardner-Denver Co., supra,* suggests, that although their union has, by law, been accorded certain privileges because of the majoritarian process, individuals who hold religious views that may be different from the majority have also been granted certain rights by law. Congress has stated that in such a confrontation, the individual's rights to equal employment opportunities, as guaranteed by Title VII, take priority.

The Union claims that the religious accommodation requirements of Title VII may not touch upon union security arrangements because when Congess in 1977 amended the National Labor Relations Act and extended coverage of the Act to employees of non-profit hospitals, it then exempted "any employee of a health-care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide body or sect, which has historically held conscientious objections to joining or financially supporting labor organizations" from union security agreements.

But, the enactment of § 19 of the NLRA went far beyond the requirements of Title VII. Legislative history of § 19

of the NLRA confirms that Congress was aware that among the employees of health-care institutions were *large* numbers of employees whose religious beliefs would keep them from paying dues to a union. The legislative history noted that the Seventh-day Adventist Church itself operates 41 non-profit hospitals and that a substantial number of employees employed by these hospitals are members of the Seventh-day Adventist Church. Because a large concentration of individuals within a hospital operated by the Church might well have religious objection to union membership, there existed the probability that the "undue hardship" legislative test provided for in § 701(j) of Title VII would be applied to defeat those employees' accommodation rquests. A union might successfully assert that the large number of employees employed in the health-care field seeking accommodation would constitute an undue hardship to the union. The 1974 religious exemption provision in § 19 of the NLRA thus precluded such a defense.

It is clear that recent legislation amending the National Labor Relations Act to require accommodation of those holding religious objections to the payment of union dues also confirms prior legislative intent.

In December, 1980, Congress amended § 19 of the NLRA to provide for a charity-substitution accommodation for all religious objectors who were covered by the NLRA, not just those in health-care P.L. 96-593. Thus, this new law expanded the *absolute* religious exemption for health-care employees, 29 U.S.C. § 169, to *all* employees covered by the NLRA.

Contrary to the Union's suggestion that the NLRA is the sole and exclusive protection for religious objectors, the legislative history of the new accommodation provision of the NLRA clearly reveals that Title VII religious accommodation requirements and NLRA religious exemption provisions are meant to be complementary and together work for the national policy of equal employment oppor-

tunity and nondiscrimination. 126 Cong. Record, H 758-796 (daily ed. Feb. 11, 1980). Particular attention should be given to the comments of Representative Clausen, one of the co-sponsors of the "Conscience Clause" bill, wherein he sets forth the purpose of this legislative provision. In his remarks he noted recent federal-court decisions upholding the religious accommodation provisions of Title VII and stated:

> The legislative history of the proposed amendment to the National Labor Relations Act indicates that the bill and Title VII were meant to be complementary. The purpose of the previous bills and the purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the federal courts of appeal ruling on the issue have found to be an accommodation acceptable under Title VII.

126 Cong. Record, H 763 (daily ed. Feb. 11, 1980).

Comments of the co-sponsors of this new statute indicate that Congress sought to reinforce and make even clearer the fact that the charity-substitution type of an accommodation is the kind of accommodation that Congress had in mind when adopting § 701(j) of Title VII. The purpose is to resolve and stop conflicts and costly litigation. It was passed by the Congress to express congressional intent as to the reasonableness of the charity-substitution accommodation which all of the federal courts of appeals ruling on the issue have found to be an accommodation acceptable under Title VII. Passage of the amendment to the NLRA provides added support for court decisions which hold that charity-substitution should be considered a reasonable accommodation under Title VII. This, however, does not subtract from Title VII's mandate nor cloud the correctness of the decision of the district and appeals court in this case.

The Union seems to argue that Title VII relief for religious objectors cannot stand side by side with the exemp-

tion provided in the NLRA. This suggestion has been inferentially rejected by this Court. In *Alexander* v. *Gardner-Denver, supra* at 47, this Court said that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." If the NLRA were determined to be the only vehicle available to provide for religious accommodation in this area, a large segment of the workplace of this country would be unprotected. Railway workers are not protected by the NLRA but are governed by the Railway Labor Act. State employees also fall outside the parameters of the NLRA.

As recognized by the appeals court below, "[t]he question of religious accommodation simply was not addressed when Congress was considering the enactment of Sections 8(a)(3) and 8(b)(2) and when Title VII was enacted the Act did" not itself provide an exemption for unintentional discrimination resulting from the enforcement of union security clauses as it does, for example, for unintentional discrimination resulting from the implementation of a bona fide seniority or merit system."

The court below thus correctly observed:

> Given the absence of such an express exemption and the complete lack of evidence that Congress intended the courts to imply such an exemption from the NLRA, we join with the Fifth, Sixth and Ninth Circuits in holding that the union security provisions of the NLRA do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees.

Also in *Lumber Workers Local 2363* v. *Wondzell*, 444 U.S. 1040, 48 L.W. 3465 (Jan. 2, 1980), this Court dismissed an appeal from the Alaska Supreme Court for want of a substantial federal question. The Alaska Court held that a state statute equivalent to Title VII requires a charity-substitution accommodation, 601 P.2d 584 (Alaska Sup. Ct.

1979). The union appealed with the following question being presented:

> May a labor union be forced to waive its contractual right to a union shop, sanctioned under 29 U.S.C. 158(a)(3), in order to reasonably accommodate the religious beliefs of an employee as mandated by the Alaska State Human Rights Law, AS 18.80.200-280?

The dismissal of the appeal constitutes a ruling on the merits. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975).

If the religious accommodation provisions of Title VII have any force and meaning whatsoever, they must strike down and prevent the absolute disregard for religious needs which the Union exhibited toward Darrel Nottelson in this case.

II. Section 701(j) Of Title VII Does Not Violate The Establishment Clause Of The First Amendment But Rather Fulfills The Principle Of Free Exercise Of Religion.

The Union claims that under the NLRA and prior to the enactment of Title VII religious objectors had no right to be relieved from the burden of union-security clauses which impacted on their religious beliefs. It cites Judge Learned Hand in *Otten* v. *Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953), for the proposition that "[w]e must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life . . . ."

This judicial philosophy, however, does not reflect the teachings of this Court in *Sherbert* v. *Verner*, *supra*, and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), which held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

Since *Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944), it has been recognized that federal labor legislation which bestows broad powers on labor unions involves state action.

In *Railway Employee's Dept., AFL-CIO* v. *Hansen*, 351 U.S. 225 (1956), this Court declared that it is the federal government which is the effective force upon the employee in this situation. The collective bargaining agreement has "the imprimatur of federal law upon it," and "the federal statute is the source of power" by which the right of the individual is "lost or sacrificed". *Id.* at 232. See also *Linscott* v. *Millers Falls*, 440 F.2d 14 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); *Gray* v. *Gulf, Mobil and Ohio Ry. Co.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1970).

In *Linscott* v. *Millers Falls, supra*, the court of appeals applied the Free-Exercise balancing test but found there was a stronger governmental interest in the union shop than in religious free exercise. *Id.* at 17-18. But congressional priorities have changed as evidenced by the NLRA. This Court has the right to take judicial notice of legislative facts in interpreting and developing law. *Weinstein's Evidence*, § 200[3] (pages 200-14 & 15). It is clear that a new legislative attitude and governmental concern has developed. Our lawmakers now believe that religious liberty should prevail over national labor law policy on the question of union security. Even organized labor, as personified by the AFL-CIO Executive Council, generally has acknowledged that the religious rights of workers must be accommodated. Governmental agencies such as the Equal Employment Opportunity Commission seek to implement this new governmental concern. This court will find ample evidence in this in the legislative history and debates on legislation concerning this question. See 126 Cong. Record H759-765 (daily ed. Feb. 11, 1980) and 126 Cong. Record S16615-16 (daily ed. Dec. 15, 1980).

What might have been held to be a "compelling interest" at the time *Linscott* and similar cases were decided no longer carries the same force. These cases predate the

adoption of the reasonable accommodation requirements of Title VII and the growing public concern for individual equal employment opportunity and religion-based rights. In light of these facts there is today no compelling governmental interest justifying this infringement of one's religious beliefs and practices. The Chief Justice, in referring to the preferential position of the First Amendment, recently noted that "[t]he values enshrined in the First Amendment plainly rank high 'in the scales of our national values.'" *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In applying the Free Exercise balancing test there should be no greater compelling governmental concern than the protection of the First Amendment rights of its people.

Sherbert v. *Verner, supra* at 407, makes clear that at times the government is required under the free exercise clause of the First Amendment to take affirmative steps to remove barriers to the free exercise of religion by making special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion as a result of increased governmental involvement in societal affairs.

Nottelson claims that the Free Exercise Clause of the First Amendment requires an accommodation for his religious convictions. This Court in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), suggested that "separation of church and state" is not an independent principle, that the principle is that of religious liberty. The religion clauses of the First Amendment must be read together, and religious liberty is to be protected by the First Amendment against government action either establishing religion or prohibiting its free exercise.

Sherbert v. *Verner, supra,* was not only a decision dealing with the Free Exercise Clause. As an Establishment case, *Sherbert* is significant in that it makes clear that exemptions solely on the basis of religion are not necessarily establishments of religion if they are designed to protect

the Free Exercise of religion. The purpose of § 701(j) is to accomplish just that.

In *Zorach, supra,* this Court recognized the principle of religious accommodation and noted that the people of the United States are in fact a religious people. This accommodation is permitted in order to maintain a neutrality between religious believers and nonbelievers.

In *Sherbert* this Court noted that the state had denied Mrs. Sherbert her First Amendment rights under the Free Exercise Clause because there was no compelling state interest to justify the infringement of her Free Exercise rights. It also made clear that although judicial action declaring a practice a violation of the free exercise clause might be construed as carving out an exception on the basis of religion, such an exception may be compelled by considerations of Free Exercise and cannot be regarded as an establishment of religion.

This Court reviewed the relationship existing between the Free Exercise and Establishment Clauses of the First Amendment in *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 669-70 (1970):

> Each value judgment under the religion clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the establishment and free exercise clause has prevented the kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice.

As stated above, Congress bestowed broad powers on labor unions. The collective bargaining agreement has "the imprimatur of federal law upon it." But when government is involved in *limiting* religious freedom, the government *may* employ affirmative or exemptory measures to restore that degree of religious freedom which had existed before the

government involvement. This has been referred to as "legislative free exercise" and can be viewed as the effort by the legislature to overcome hostility to religion by an act of the state. The Court has recognized that Congress has the power to take some affirmative measure or grant an exemption in order to insure that the religious needs of individuals are satisfied.

This Court in *Walz, supra* at 673, declared that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause." Thus, the legislature may go further than is constitutionally required under the Free Exercise Clause in an attempt to accommodate where government action has been involved in limiting the religious freedom of an individual.

Section 701(j), as here applied, does not violate the Establishment Clause but rather protects the Free Exercise of religion.

The Director of Public Affairs and Religious Liberty of the international headquarters of the Seventh-day Adventist Church testified at the May 23, 1975, hearing concerning the problems faced more and more by members of the Church. He stated that there was a time when Seventh-day Adventists could go into public employment or into various professional fields and not be affected by union security agreements. However, he further stated:

> Today these areas are prime targets for organization and large success has already accompanied those organizational drives and so with very few exceptions, there is hardly a single profession today or skill that in one way or another is not controlled for the organizational drive is on. So the Seventh-day Adventists have been driven with their backs to the wall. They cannot any longer seek peacefully another way to make a living. The only thing they could do is flee the country . . . and we don't want to flee.

CONCLUSION

The days of many kinds of discrimination are, hopefully, only fading memories in this country. Gone are the signs, "No Irish Need Apply" and "No Colored Need Apply." Petitioner, the Union, figuratively speaking, seems to long for the opportunity to put in the window of the Company's personnel office a sign "No Seventh-day Adventist Need Apply."

But the decision of all the Court of Appeals that have decided the issues in this case have clearly held that Union and Company must not practice religious discrimination. These decisions reflect Congress' desire that under the Free Exercise Clause of the First Amendment, religious discrimination will be abolished from employment relationships in our Nation and that reasonable accommodations that don't create undue hardships will be made for religious dissenters. Such accommodations do not violate the Establishment Clause of the First Amendment.

As Professor Tribe has noted:

> [W]e must consider whether a nation committed to religious pluralism must, in the age of affirmative state, make active provision for maximum diversity; we must ask whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience. . . . [I]t seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers or to a coherent vision of religious autonomy in the affirmative state.

L. Tribe, *American Constitutional Law* 834 (1978).

The decision of the Seventh Circuit does not conflict with the decisions of any of its sister circuits nor is there any conflict with a state court of last resort. The decision is equally in accord with the holdings of this Court and car-

ries out the will of Congress. Thus, the Petition should be denied.

Respectfully submitted,

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